

Before the Independent Hearing Panel

UNDER The Resource Management Act 1991

IN THE MATTER of Variation 3 to the Proposed Waikato District Plan

Legal submissions on behalf of Anna Noakes and MSBCA Fruhling Trustee's Company Limited

Dated: 21 July 2022

Presented for filing by:



Joanna Beresford

PO Box 1088
Shortland Street
Auckland 1142

joanna@beresfordlaw.co.nz
+64 21 114 1277

MAY IT PLEASE THE PANEL

INTRODUCTION

1. These legal submissions are presented on behalf of Anna Noakes and MSBCA Fruhling Trustee's Company Limited as trustees of the Fruhling Trust (**Ms Noakes**) being the owners of 157 Potter Road, Tuakau (**the Property**).
2. Ms Noakes has lodged a submission¹ on Variation 3 (**Variation 3**) to the Waikato District Council (**Council**) Proposed District Plan (**PDP**) and two further submissions² on Variation 3. Ms Noakes' submission and further submissions are primarily concerned with the management of stormwater resulting from intensification at Pookeno.
3. Ms Noakes' Property is at the rural urban edge of Pookeno and is a productive farm. The way in which urban stormwater discharges have been consented and managed in the past have generated adverse effects on her Property. This is adversely affecting Ms Noakes' ability to use her farm for the productive rural purpose for which it is zoned and for which it is used. Unless Variation 3 clearly sets out how urban stormwater is to be managed in the future the situation will only get worse.
4. Ms Noakes does not accept, based on her experiences to date, that stormwater effects can all be addressed at the consenting stage unless there are strong and consistent stormwater management provisions throughout the PDP. If Variation 3 enables more intense development at Pookeno, then it is essential that the stormwater management provisions are sufficiently robust.
5. It would not be an acceptable planning outcome, and could not be consistent with a "well-functioning urban environment", to identify that there are potentially adverse stormwater effects that cannot be addressed through Variation 3, yet to have Variation 3 approved anyway. The Council's experts' indeterminate idea that stormwater

¹ Submission Number 44 dated 28 October 2022.

² Further submission dated 14 December 2022 on the primary submissions of Pookeno Community Committee, Waikato Regional Council., Pookeno Village Holdings Limited, Ministry of Housing and Urban Development, Waikato District Council, CSL Trust, Ngāti Naho Trust, Havelock Village Limited, Kainga Ora and further submission dated 24 January 2023 on Pookeno West / West Pookeno Limited.

could possibly be addressed with a future variation is deeply unsatisfactory and is clearly contrary to the sustainable management purpose of the RMA.

6. Ms Noakes seeks no more than that the district plan remains compatible with her existing use of her Property, which she has farmed for more than 20 years.
7. To this end Ms Noakes supports the improvements to stormwater management proposed by the Council and seeks further amendments to Variation 3 to strengthen the management of stormwater from more intense urban development.
8. Alternatively, if that cannot be achieved, Ms Noakes requests that the Panel places Variation 3 on hold pending a new variation being promulgated to address stormwater issues and catching up with the Variation 3 process to enable comprehensive assessment of the district's stormwater management regime. If that option is not selected, then the Panel has the option to recommend that Variation 3 not be upheld on the grounds that stormwater and flooding matters have not been properly investigated and addressed.

ISSUES ADDRESSED IN SUBMISSIONS

9. These legal submissions will address the following issues:
 - (a) Background to Ms Noakes' interest in stormwater issues under the PDP and Variation 3.
 - (b) The legal framework applicable to district plan making, intensified planning instruments (**IPIs**) and the intensified streamline planning process (**ISPP**).
 - (c) The higher order planning and policy framework applicable to stormwater management in the district.
 - (d) The relief sought by Ms Noakes.

EVIDENCE

10. Ms Noakes intends to call two witnesses:
 - (a) Ms Noakes' own evidence will explain the problem and effects occurring at the Property and the effects that this has on her ability to farm her land.
 - (b) Mr Matthew Davis' (stormwater engineer) evidence will explain how the existing consenting regime was able to result in such outcomes and identify deficiencies that would need to be addressed if Variation 3 (enabling more intense development) is approved.

BACKGROUND

Effects of urban stormwater on the Property

11. The Property is General Rural Zone under the PDP and the Pookeno Urban Residential area is immediately to the east.³ In other words, the Property *is* the urban rural interface. The Property has the potential to be adversely affected by intensification enabled by Variation 3.⁴
12. The Waikato Regional Council (**Regional Council**) consented the existing urban discharges on the basis of attenuation to predevelopment peak flows. Nonetheless, these discharges have altered the hydrological conditions on the Property, including the volume, frequency and duration of discharges, the extent of inundation on the Property, and the amount of sediment and water quality.⁵ This has resulted in loss of productive land, downstream erosion and damage to farm infrastructure.
13. Ms Noakes considers that the existing consenting regimes have failed to adequately manage the adverse stormwater effects of urban development on the Property. Ms Noakes acknowledges that participation in this process cannot change what has already occurred. However, Ms Noakes wishes to ensure that the adverse

³ Refer Statement of Evidence of Ms Noakes, Figure One.

⁴ Statement of Evidence of Mr Davis at [9] and [10].

⁵ Statement of Evidence of Ms Noakes at pages [10]-[16].

stormwater effects of future applications for urban development are adequately assessed against appropriate criteria so that the effects can be avoided, remedied or mitigated.⁶ Ms Noakes is concerned that the existing stormwater ponds that discharge urban stormwater to the Property will be unable to function adequately if there is infill development within the already developed area.⁷

PDP review

14. Ms Noakes' appeal against Council's decision on the PDP is in relation to stormwater matters (**Appeal**)⁸. **Annexure 1** to these legal submissions contains the relief sought in the Appeal.
15. The scope of the Appeal is narrow and cannot provide a comprehensive solution to stormwater effects that would be generated by the more intense development enabled by Variation 3.
16. The Appeal is largely confined to stormwater management provisions in the Chapter 12 Water, Wastewater and Storm Water (**WWS**) and Chapter 3 All Infrastructure (**AINF**) of the PDP. The Appeal also seeks amendments to the subdivision and General Residential Zone (**GRZ**) chapters. The Appeal does not (and indeed could not) seek amendments in relation to the new Medium Residential Zone 2 (**MRZ2**), which is now proposed to apply to the urban land adjacent to Ms Noakes' Property.
17. Further, the relief sought in the Appeal does not include amendments to the natural hazards and earthworks chapters of the PDP (both of which were notified as part of Variation 3). However, taking a comprehensive and consistent approach to stormwater management would require that amendments are made to all provisions affecting stormwater management in the chapters of the PDP that were notified as part of Variation 3.

⁶ Statement of Evidence of Ms Noakes at pages [16]-[17].

⁷ Statement of Evidence of Ms Noakes at paragraph [14].

⁸ *Noakes and Fruhling Trust v Waikato District* ENV-2022-AKL-00078.

Interest in Variation 3

18. Ms Noakes is concerned that the cumulative effects of more intense urban development and increased impervious surface area in the district, which will be enabled by Variation 3, will generate and exacerbate adverse stormwater and run-off effects.⁹
19. Ms Noakes is also concerned that more intense development enabled as a permitted activity will reduce the degree to which Council is able to scrutinise development proposals and impose conditions to avoid, remedy or mitigate adverse stormwater effects of developments.
20. If Variation 3 is approved then the stormwater management provisions throughout the PDP ought to ensure that adverse stormwater effects on properties downstream of proposed developments are appropriately, avoided remedied or mitigated.
21. Specifically, the stormwater provisions of the PDP ought to be amended to address the adverse stormwater effects of more intense development. In particular, to address the effects of altered natural flow paths, and altered the hydrological conditions (including increased erosion / scour and the volume, frequency and duration of discharges) and to ensure that development is not located where the effects of discharging urban stormwater to rural environments that lack infrastructure designed to accommodate urban run-off cannot be adequately avoided, remedied or mitigated.¹⁰

Urban fringe qualifying matter

22. Variation 3 as notified includes an urban fringe qualifying matter. The purpose of that qualifying matter was to promote an urban form that would concentrate intensification in walkable catchments and close to the amenities of town centres. In Pookeno, this qualifying matter was intended to address concerns that restrictive covenants close to the town centre, combined with larger lot sizes on the periphery,

⁹ Statement of Evidence of Ms Noakes at [7] and [8].

¹⁰ Ms Noakes preference would be for natural flow and hydrological conditions to be maintained post development (refer Statement of Evidence of Ms Noakes at page [18]). However, Mr Davis has acknowledged that because urban development will always result in some change the chief concern is to avoid, remedy or mitigate the adverse effects of alterations to stormwater runoff (refer Rebuttal Statement of Mr Davis at paragraph [33]).

would mean that market forces would operate to incentivise more intense development toward the periphery.¹¹

23. Ms Noakes' reason for supporting of the urban fringe qualifying matter was because this approach would better manage the urban rural interface, particularly in relation to the adverse and cumulative stormwater effects of more intense urbanisation on adjacent rural areas. The same applies to the corresponding proposal not to upzone and incorporate the MDRS in the urban fringe area. Given the urban fringe qualifying matter is all but removed, the parties are now proceeding on the basis that the default position is that the urban fringe area will be rezoned from GRZ to MRZ2, which will apply the Medium Density Residential Standards (**MDRS**).¹²

Council's stormwater and flooding planning response

24. In the absence of the urban fringe qualifying matter, Council via its stormwater discussion document,¹³ the Te Miro Report,¹⁴ section 42A Report and expert evidence has identified issues with the stormwater management regime under proposed under Variation 3.
25. The Council stormwater discussion document and the Te Miro Report record that:¹⁵
- (a) The infrastructure assessment has identified flood hazards in urban areas that have not been previously mapped, and that there are some deficiencies with the drafting of existing rules intended to manage stormwater at the time of development.
 - (b) With the application of qualifying matters related to significant natural hazards and a qualifying matter under s 77G and Te Ture Whaimana o Te Awa o Waikato – the Vision & Strategy for the

¹¹ Refer to discussion in Section 32 Evaluation – Volume 2. The existing land covenants and that land prices are cheaper at the periphery means there is a real prospect of urban development taking advantage of the more permissive regime under Variation 3 adjacent to the Property (outside of the Havelock Slope Residential Area given the lot size restrictions proposed for that land).

¹² As set out in Part 2 of Schedule 3A to the RMA.

¹³ Waikato District Council Stormwater Discussion Document at section 1.

¹⁴ Waikato District Council Variation 3 Technical Review: Stormwater; Tuakau, Pookeno, Huntly and Ngaaruawaahia dated May 2023.

¹⁵ Waikato District Council Stormwater Discussion Document at section 1.

Waikato River (**Te Ture Whaimana**), the stormwater and flooding effects can be avoided and mitigated to an extent (but not fully).

26. Furthermore, the Council's stormwater expert Mr Boldero has expressed that:
- (a) Without a robust district plan framework in place, increased intensification may deprive the District of the land area needed to ensure stormwater is managed to align with Te Ture Whaimana and Te Mana o te Wai.¹⁶
 - (b) That there is a need to further consider the impact of urban development on the principles in Te Ture Whaimana and Te Mana o te Wai and how these principles will be given effect to (specifically the restoration of water quality in the receiving environment including the Waikato and Waipā rivers and their tributaries).¹⁷
 - (c) It would be preferable for Variation 3 to avoid all development in the modelled high-risk areas, and for a consent to be required for development or subdivisions in all other areas within the flood plain and/or overland flow paths.¹⁸
 - (d) There are concerns about the way in which the PDP (before the introduction of Variation 3) manages stormwater in flood plain and overland flow path areas and that development or subdivision within a flood plain or overland flow path should require a technical assessment.¹⁹
 - (e) When the MDRS is in place it will increase the permitted activities and reduce Council's ability to ensure developments comply with Council's stormwater discharge consent conditions.²⁰

¹⁶ See discussion in Statement of Evidence of Mr Boldero at paragraph [10].

¹⁷ Statement of Evidence of Mr Boldero at [16].

¹⁸ Statement of Evidence of Mr Boldero at [17].

¹⁹ Statement of Evidence of Mr Boldero at [29].

²⁰ Statement of Evidence of Mr Boldero at [39].

27. The Section 42A Report and expert evidence on behalf of Council has proposed amendments to Variation 3 to address flooding and stormwater management matters.
28. It appears that Council is proposing to:²¹
- (a) Apply a stormwater constraints overlay to better manage some flooding effects by reducing the number of households within the flood hazard area and contribute to mitigating flood hazard effects by requiring resource consent for developments that constrain and reduce the amount of space available for the management of water.
 - (b) Maintain the GRZ standards for one residential unit (with a minor residential unit if the site size allows), setbacks (yards), building coverage and minimum lot size where sites are affected by flood hazards within the stormwater constraints overlay that:²²
 - (i) is within the Urban Fringe; and
 - (ii) aligns with the new modelled flood plains; or
 - (iii) existing flood plain management area, flood ponding area and the Defended Areas in the PDP.
 - (c) Apply a non-complying activity status for two or more primary residential units in the high-risk flood area within the stormwater constraints overlay.²³
 - (d) Include additional matters of discretion to subdivision rules and development standards relating to Low Impact Design, flood management including access and egress, and Te Ture

²¹ Council circulated preliminary discussion papers but reserved its final position on stormwater until after the stormwater expert conferencing held on 11 July and its experts communicated their position via its rebuttal evidence circulated on 19 and-20 July 2023, with a rebuttal Section 42A Report Addendum on 21 July 2023. At the time of filing legal submission is not all together clear which proposals represent Council's position and whether measures in rebuttal are replacements, refinements or additions. It is expected that this will be clarified by Council's legal submissions and at the hearing and Ms Noakes will update her response to Council's position at the hearing as required.

²² Statement of evidence of Ms Huls at [14].

²³ Statement of evidence of Ms Huls at [15].

Whaimana should be added to appropriate restricted discretionary activities.²⁴

29. Following the exchange of evidence and stormwater caucusing, Council's rebuttal evidence has further proposed:
- (a) Inserting new provisions into the Natural Hazards chapter and amended matters of discretion for Subdivision to better reflect good stormwater management.²⁵
 - (b) Inserting new rules NH-26A, NH-26B, NH-26C, NH-26D and NH-26E in the Natural Hazards chapter to give effect to the stormwater constraints overlay.²⁶
 - (c) Using a building platform requirement in place of minimum site size and amended development controls and site sizes.²⁷
 - (d) That development in the flood plain should trigger a resource consent.²⁸
 - (e) Changes to the assessment criteria in MRZ2-S1, MRZ-S4, MRZ-S5, MRZ-S10, SUB-153 and SUB-154. In particular, including:
 - (i) the following matters of discretion in SUB – R153 (Subdivision General - MRZ2 Zone):
 - (ii) The effectiveness of the stormwater system to manage flooding (including safe access and egress), nuisance or damage to other infrastructure, buildings and sites, including the rural environment.
 - (iii) The capacity of the stormwater system and ability to manage stormwater.
 - (iv) The potential for adverse effects to the environment in terms of stormwater quantity and stormwater quality effects.

²⁴ Statement of Evidence of Ms Huls at [16].

²⁵ Rebuttal Section 42A Report at [58].

²⁶ Rebuttal Section 42A Report at [58].

²⁷ Rebuttal Section 42A Report at [59].

²⁸ Rebuttal Section 42A Report at [67]

- (v) Extent to which low impact design principles and approaches are used for stormwater management.
 - (vi) Consistency with the relevant stormwater catchment management plan.
- (f) A new matter of discretion in SUB-R154 (Subdivision Residential in the MRZ2) being "*The potential for adverse effects to the environment in terms of stormwater quantity and stormwater quality effects*".
- (g) A new rule in the Water Wastewater and Stormwater chapter to require a stormwater management plan for development or subdivision of 4 or more units or lots, to will ensure the minimum stormwater quality standards in the Council's relevant discharge consents will be achieved (WWS-R1A).²⁹ New rule WWS-R1A includes the following matters of discretion:
- (i) The extent to which the application enhances the Waikato River and its tributaries.
 - (ii) The effectiveness of the stormwater system to manage flooding (including safe access and egress), nuisance or damage to other infrastructure, buildings and sites, including the rural environment.
 - (iii) The capacity of the stormwater system and ability to manage stormwater.
 - (iv) The potential for adverse effects to the environment in terms of stormwater quantity and stormwater quality effects.
 - (v) The extent to which low impact design principles and approaches are used for stormwater management.
- (h) A new rule to manage the location and design of services in infill sites where there is scope within Variation 3 WWS-R1B.³⁰

²⁹ Rebuttal Section 42A Report at [68].

³⁰ Rebuttal Section 42A Report at [69].

30. The reporting planner and technical witnesses on behalf of Council also consider that if some of their recommendations cannot be addressed through Variation 3 (because of limitations on IPIs) then the matters should be addressed either through appeals on the PDP or by a separate Variation.³¹

LEGISLATIVE FRAMEWORK

District plan making

31. Sections 72 to 77 of the RMA provide the legal framework for district plans. The Resource Management Act (Enabling Housing Supply and Other Matters) Amendment Act 2021 (**Amendment Act**) did not substantively amend these provisions. The general plan making requirements of the RMA continue to apply to the ISPP that has promulgated Variation 3 as an IPI.³²
32. In summary, the purpose of district plans is to assist territorial authorities to carry out their functions in order to achieve the purpose of the Act.³³ A territorial authority is required to change its district plan in accordance with its functions under s 31, the provisions of Part 2, its obligations under s 32 of the RMA, relevant national policy statements, national planning standard or regulations.³⁴
33. The sustainable management purpose in Part 2 requires territorial authorities to manage the use, development or protection of natural physical resources in a way or at a rate, which enables people and communities to provide for the social, economic and cultural wellbeing and for the health and safety while (amongst other things) avoiding remedying or mitigating any adverse effect of activities on the environment.
34. Relevant functions of territorial councils under s 31 of the RMA include:³⁵

³¹ See for example Rebuttal Section 42A Report at [58].

³² With the exception of s 77G(8) that states that the requirement to incorporate the MDRs under s 77G(1) applies irrespective of an inconsistent objective or policy in a regional policy statement.

³³ RMA, s 72.

³⁴ RMA, s 74(1).

³⁵ RMA, s 31. Refer to Section 42A Report [41].

- (a) ensuring sufficient development capacity in respect of housing and business land to meet the expected demands of a district.
 - (b) integrated management of the effects of the use of a development and protection of land and associated natural and physical resources of the district and the control of any actual or potential effects of the use, development or protection of land and associated natural and physical resources of the district and the control of any actual or potential effects of the use, development or protection of land.
35. Section 75(3) requires that a district plan must give effect to a relevant national policy statement, the New Zealand Coastal Policy Statement, the national planning standards, and any regional policy statement.³⁶ A district plan must not be inconsistent with a regional plan for any matter specified in s 30(1) of the RMA.³⁷
36. When preparing a plan change a territorial authority shall have regard to proposed regional policy statement or plan, management plans and strategies prepared under other enactments and any national adaption plan under the Climate Change Response Act 2002.³⁸
37. Territorial authorities have considerable flexibility in relation to the rules included in a district plan. Rules can be specific or general and apply throughout the district or part of a district and can require resource consent to be obtained for any activity causing or likely to cause adverse effects not covered by the plan.³⁹ Of particular relevance is that rules may be made for the protection of other property⁴⁰ from the effects of surface water.⁴¹

³⁶ As noted in note 33 above there is an exception for an objective or policy in a regional policy statement that is inconsistent with the MDRS under s 77G(1).

³⁷ RMA, s 75(4). Section 30(1) relates to the functions of regional councils and includes the management of land use to avoid or mitigate natural hazards.

³⁸ RMA, s 74(2).

³⁹ RMA, s 76(4).

⁴⁰ As defined in s 7 of the Building Act 2004, which include land.

⁴¹ RMA, s 76(2A), which requires persons undertaking building work to achieve performance criteria additional to, or more restrictive than those specified in the building code under the BA 2004.

The Amendment Act

38. Council The Amendment Act requires Council to promulgate an IPI using the ISPP in order to incorporate the MDRS into every relevant residential zone and to give effect to Policy 3 of the National Policy Statement of Urban Development (**NPS-UD**).⁴² Councils were required to notify their IPIs by the specified date⁴³ and may not withdraw the IPI.⁴⁴ However, there is nothing that requires the Panel to recommend that an IPI be approved (although not doing so would presumably require a council to promulgate a new plan change or variation to comply with the requirements to include the MDRS and required policies in a district plan).
39. Council must include the objectives and policies set out in clause 6 of Schedule 3A, may include objectives and policies in addition to those set out in clause 6 of Schedule 3A to provide for matters of discretion to support the MDRS and to link to the incorporated density standards to reflect how Council has chosen to modify the MDRS in accordance with s 77H (more enabling).⁴⁵
40. Council may make a requirement in Schedule 3A or Policy 3 of the NPS-UD more lenient to enable greater development⁴⁶ but may only make the requirement less enabling if authorised to do so under s 77I.⁴⁷
41. Section 77I provides that council may make the MDRS and the relevant building height or density requirement under Policy 3 of the NPS-UD less enabling of development only to the extent necessary to accommodate the specified qualifying matters.

The IPI and ISPP procedure

42. Subpart 5A of the RMA and Part 6 of Schedule 1 provide for use of the ISPP for the preparation of an IPI by a specified territorial authority in order to achieve an expeditious planning process.

⁴² RMA, s 77G.

⁴³ RMA, s 80H (unless granted an extension by the Minister as occurred for Council).

⁴⁴ RMA, 80H.

⁴⁵ RMA, s 77G(5).

⁴⁶ RMA, s 77H.

⁴⁷ RMA, s 77G(6).

43. Section 80E of the RMA defines an IPI as follows:

80E Meaning of intensification planning instrument

- (1) In this Act, **intensification planning instrument** or **IPI** means a change to a district plan or a variation to a proposed district plan—
- (a) that must—
 - (i) incorporate the MDRS; and
 - (ii) give effect to,—
 - (A) in the case of a tier 1 territorial authority, policies 3 and 4 of the NPS-UD; or
 - (B) in the case of a tier 2 territorial authority to which regulations made under section 80I(1) apply, policy 5 of the NPS-UD; or
 - (C) in the case of a tier 3 territorial authority to which regulations made under section 80K(1) apply, policy 5 of the NPS-UD; and
 - (b) that may also amend or include the following provisions:
 - (i) provisions relating to financial contributions, if the specified territorial authority chooses to amend its district plan under section 77T;
 - (ii) provisions to enable papakāinga housing in the district;
 - (iii) related provisions, including objectives, policies, rules, standards, and zones, that support or are consequential on—
 - (A) the MDRS; or
 - (B) policies 3, 4, and 5 of the NPS-UD, as applicable.
- (2) In subsection (1)(b)(iii), **related provisions** also includes provisions that relate to any of the following, without limitation:
- (a) district-wide matters;
 - (b) earthworks;
 - (c) fencing;
 - (d) infrastructure;
 - (e) qualifying matters identified in accordance with section 77I or 77O;
 - (f) storm water management (including permeability and hydraulic neutrality);
 - (g) subdivision of land.

44. Part 6 of Schedule 1 to the RMA sets out the ISPP and deals with procedural matters such as notification requirements, the role and powers of the independent hearings panel, the process for decisions on the Panel's recommendations and appeals and judicial review.

45. Schedule 3A to the RMA, sets out the MDRS incorporated by specified territorial authorities. The following clauses of Schedule 3A have implications for stormwater management:
- (a) **Clause 7:** requires that any subdivision provisions (including rules and standards) must be consistent with the level of development permitted under the other clauses of this schedule, and provide for subdivision applications as a controlled activity.
 - (b) **Clause 8:** provides that there must be no minimum lot size, shape size, or other size-related subdivision requirements where existing or consented land use (or land use able to be consented concurrently with the subdivision) does not increase the degree of non-compliance with the density standards.
 - (c) **Clause 14:** the maximum building coverage must not exceed 50% of the net site area.
 - (d) **Clause 18:** a residential unit at ground floor level must have a landscaped area of a minimum of 20% of a developed site of grass or plants.
46. Overall there several key principles can be distilled regarding the IPI and ISPP in relation to stormwater management:
- (a) The Amendment Act requires councils to promulgate variations in the form of IPIs that incorporate the MDRS and give effect to policy 3 of the NPS-UD. However, councils' general duties in respect of plan making remain.⁴⁸
 - (b) Section 80E of the RMA contemplates that stormwater management (including permeability and hydraulic neutrality) can be addressed as related provisions to the MDRS separately from the qualifying matters regime.
 - (c) While the clear purpose of Variation 3 is to enable more intense residential development through the incorporation of the MDRS, if a proposal would generate adverse stormwater effects then it is submitted that there should be consequential provisions in the

⁴⁸ Except as noted in note 33 above.

district plan to ensure that those effects are adequately avoided, remedied or mitigated.

Amending Variation 3 to address stormwater effects

47. Under s 80E(2)(f) stormwater management (including permeability and hydraulic neutrality) is defined as being a related provision to the MDRS (for the purposes of s 80E(1)(b)(iii)).
48. Accordingly, territorial authorities have the power to make amendments to an IPI that relate to stormwater management (provided the proposed amendments support or are consequential to the introduction of the MDRS).

Response to Council's proposed amendments to Variation 3 to address stormwater effects

49. The Council's stormwater discussion document, the Te Miro Report, Section 42A Report and the evidence on behalf of Council recommends changes to the PDP to address stormwater effects.
50. However, despite s 80E(2)(f) Council's experts appear to consider that legally some of those changes cannot be made to the stormwater provisions in the PDP because of the limitations inherent in the IPI process.
51. In particular, the approach in the PDP is to manage stormwater at the development stage with a permitted activity rule with a number of standards. The Te Miro Report has indicated that assessing compliance with this rule as a permitted activity is difficult and requires an applicant to have engaged the appropriate experts. The preferred approach would including changing the activity status from permitted to requiring a consent for stormwater management purposes district wide and amendments to a key stormwater rule WWSR1 that is required to be implemented successfully to support good stormwater outcomes including the safe and effective conveyance, water quality and flooding outcomes.
52. Council's experts have suggested that if these additional measures fall outside what can be achieved through the IPI process they should

be addressed through the PDP appeals process or a subsequent variation.

53. It appears Council's experts' concerns arise due to the decision of *Waikanae Land Company v Heritage New Zealand Pouhere Taonga*.⁴⁹
54. In *Waikanae* an IPI included a proposal to list a site in a schedule of waihi tapu area. The site had not previously been scheduled. The appellant contended that the proposed new waihi tapu listing could not be introduced under an IPI because there was a limited statutory power to introduce new qualifying matters, which can only be used to make the MDRS less enabling of development.
55. The Court held that the proposed waihi tapu listing was *ultra vires* and found that:
 - (a) A territorial authority's powers in undertaking the IPI process are confined to the matters identified in relevant provisions.⁵⁰
 - (b) Qualifying matters introduced through the IPI process must relate to the standards identified in the definition of the MDRS and cls 10-18 of Schedule 3A and to make those standards less enabling.⁵¹
 - (c) Focusing on whether the new waihi tapu listing was *related* to the relevant qualifying matter failed to refer back to the overarching gateway in s 80E(1)(b) that the related provision may only be included in an IPI if it "*is a change which supports or is consequential upon the MDRS*".⁵²
 - (d) The listing of the waihi tapu site in *Waikanae* did not support the MDRS as it actively precluded the operation of the MDRS and was not consequential on the MDRS.⁵³

⁴⁹ *Waikanae Land Company v Heritage New Zealand Pouhere Taonga* [2023] NZEnvC 056.

⁵⁰ *Waikanae* at [23].

⁵¹ *Waikanae* at [25].

⁵² *Waikanae* at [29]-[30].

⁵³ *Waikanae* at [30].

- (e) The listing of the wahi tapu site in *Waikanae* went far beyond making the MDRS less enabling and disenabled rights existing under the district plan.⁵⁴
56. It is respectfully submitted that *Waikanae* is distinguishable because it does not relate to stormwater matters.
57. Stormwater provisions in the PDP are clearly related to and support or are consequential on the MDRS. Further, the amendments sought to Variation 3 to address stormwater issues are matters that may be included in an IPI where they support or are consequential to the MDRS and do not disenable development rights under the IPI.
58. In this case:
- (a) As set out above, the MDRS include provisions that are directly relevant to and have the potential to have adverse effects on stormwater management.
- (b) The legislative and planning policy regime (discussed below) requires Council to achieve integrated management of the effects of land use in its district, to enable the natural and built environment to co-exist, and to manage stormwater effects (including through the use of water sensitive and low impact design) while at the same time providing for more intense development by incorporating the MDRS.
59. It is submitted that the two competing policy directives (i.e. to manage stormwater effects and to intensify) can be reconciled if amendments (such as those sought by Ms Noakes) are recognised as being supportive of or consequential to the MDRS. This is because such amendments enable the MDRS to be introduced in a manner that does not offend the overarching legislative and policy framework.
60. Further, it is submitted that the amendments sought by Ms Noakes are clearly within the scope of Variation 3.⁵⁵

⁵⁴ *Waikanae* at [31]-32].

⁵⁵ The first limb of the test in *Clearwater Resort Limited v Christchurch City Council* (HC Christchurch AP34/02, 14 March 2003), requires that for submissions to be on the variation if it addresses the extent to which the variation alters the status quo.

61. Variation 3 is not a narrow variation:
- (a) The notified IPI is 400 pages long and includes amendments to the Strategic directions chapter, the Interpretation and Definitions Chapter, Chapter 3A MRZ2 Zone, Chapter 12 Water, Wastewater, Stormwater, Chapter 20 Te Ture Whaimana – Vision and Strategy, Chapter 25 Subdivision and Chapter 39 Earthworks. All of these chapters contain provisions relevant to managing the how land use affects stormwater in the district.
 - (b) More significantly, however, in the absence of the urban fringe qualifying matter, Variation 3, fundamentally alters the planning regime that applies at Pookeno:
 - (i) The Decisions Version of the PDP adopted a zoning framework that allowed for more intense development in the areas surrounding the Pookeno town centre through the Medium Density Residential Zone and for a lesser form of development further out and along the rural edge of Pookeno under the GRZ.
 - (ii) Applying the MDRS to the urban edge of Pookeno adjacent to productive rural land is a significant change. If that change has a potential to generate adverse effects on the adjacent rural environment, it is submitted that it is within scope of Variation 3 to include amendments designed to address the effects caused by that change.
 - (iii) There is a wide range between Variation 3 as notified (maintaining the status quo with no additional development rights) and the submissions that sought removal of the urban fringe overlay and rezoning – removal of the overlay but with no additional provisions to manage the effects of that rezoning and incorporation of the MDRS. It is submitted that amendments to the provisions required to manage stormwater that were include in the chapters notified

must fall between those two end points and be within scope of Variation 3.⁵⁶

PLANNING POLICY FRAMEWORK

62. In addition to the statutory framework discussed above, the national and regional policy framework requires plan changes to address both flooding and adverse stormwater effects.

National Policy Statement for Freshwater Management 2020

63. While much of the National Policy Statement for Freshwater Management 2020 (**NPS-FM**) is aimed at Regional Councils the integrated management approach as required by Te Mana o te Wai, requires local authorities to reconsider interactions between freshwater land and receiving environments,⁵⁷ manage land use and development in an integrated and sustainable way to avoid, remedy or mitigate adverse effects, including cumulative effects, on the health and wellbeing of receiving environments.⁵⁸
64. Every territorial authority must also include objectives, policies, and methods in its district plan to promote positive effects, and avoid, remedy, or mitigate adverse effects (including cumulative effects), of urban development on the health and well-being of water bodies, freshwater ecosystems, and receiving environments.⁵⁹

NPS-UD

65. The National Policy Statement on Urban Development 2020 (**NPS-UD**) is directly relevant to the Panel's decision making on Variation 3.⁶⁰ Variation 3 is intended to give effect to policies 3 and 4 of the NPS-UD and to the NPS-UD as a whole. A number of

⁵⁶ Further, section 99(1) of the RMA broadens the scope of the Panel's recommendatory power from the orthodox approach which limits scope to matters that are deemed "on" the plan change provided they are raised in submissions to being bounded by the notified IPI at one end and matters raised in the hearing at the other.

⁵⁷ NPS-FM 2020, cl 3.5 (1)(b).

⁵⁸ NPSFM 2020, cl 3.5 (1)(c).

⁵⁹ NPSFM 2020, cl 3.5(4).

⁶⁰ *Southern Cross Healthcare Ltd v Eden Epsom Residential Protection Society Inc* [2023] NZHC 948.

objectives and policies are relevant to the matters raised by Ms Noakes:

- (a) **Objective 1:** that New Zealand has well-functioning urban environments that enable all people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety, now and into the future.
- (b) **Objective 6(a):** that requires that local authority decisions on urban development that affect urban environments are integrated with infrastructure planning and funding.
- (c) **Objective 6(c):** that requires that local authority decisions are responsive to proposals that would supply significant development capacity and.
- (d) **Objective 7:** that requires authorities to have robust and frequently updated information about their urban environments and use it to inform planning decisions.
- (e) **Objective 8 and Policy 1:** that require that New Zealand's urban environments are resilient to the current and future effects of climate change.
- (f) **Policy 2:** that requires that tier 1, 2, and 3 local authorities, at all times, provide at least sufficient development capacity to meet expected demand for housing over all time frames.

Future Proof 2022

66. Future Proof 2022 is primarily aimed at managing how and where growth is accommodated within the Hamilton, Waipa and Waikato subregion over the next 30 years. But two (of seven) transformational moves are directly relevant to stormwater management in the district:

- (a) Thriving communities and neighbourhoods including quality, denser housing options that allow natural and built environments to co-exist, and increased housing affordability and choice.

(b) Growing and fostering water-wise communities through a radical shift in urban water planning, ensuring urban water management is sensitive to natural hydrological and ecological processes.

67. The growth management directives in Future Proof 2022 also include using water sensitive urban design, low impact design, water demand management and reuse, and integrated catchment planning to promote clean and sustainable water outcomes in masterplanning and urban design⁶¹ and to ensuring that water sensitive planning and design principles are considered at all scales.⁶²

Te Ture Whaimana o Te Awa of Waikato

68. The Section 42A report has addressed Te Ture Whaimana and identified that a matter required to give effect to Te Ture Whaimana is a qualifying matter under s 77I of the RMA.⁶³ The stormwater conferencing acknowledged Te Ture Whaimana as the primary direction setting document and a key statutory document for the Waikato River.⁶⁴ Stormwater forms a large requirement of Te Ture Whaimana and the impact stormwater has on the health and wellbeing of the Awa.⁶⁵

Waikato Regional Planning Instruments

Waikato Regional Policy Statement

69. The Section 42A Report has considered the Waikato Regional Policy Statement (**WRPS**) and Proposed Plan Change 1 to the WRPS (which seeks to incorporate the requirements of the NPS-UD and updated Future Proof Strategy).⁶⁶ The reporting planners conclude Variation 3 generally gives effect to the WRPS (and proposed Change 1).

⁶¹ Future Proof 2022 at page [50].

⁶² Future Proof 2022 at page [83].

⁶³ Section 42A Report at [54]-[60].

⁶⁴ Rebuttal section 42A Report at [64].

⁶⁵ Statement of Evidence of Mr Martin at [77].

⁶⁶ Section 42A Report at [48]-[52]. Council is required to give effect to the WRPS and must have regard to PC1.

70. In general, the focus of the WRPS Land and Freshwater Chapter in relation to freshwater is on allocation and water quality. In terms of stormwater management, the most relevant methods in the WRPS are:

- (a) LF-M20 – Effects of subdivision use and development provides that “*territorial authorities should, in accordance with their statutory responsibilities, manage the effects of subdivision, use and development either by statutory or non-statutory means, including through district plans, development and subdivision guidelines and structure plan by considering... managing flows into stormwater networks **including through the adoption of low impact design...the promotion of best practice stormwater management for urban areas**, including the need for stormwater catchment plans for greenfield urban development*”. (Emphasis added)
- (b) LF-M21, which provides that WRC will promote low impact design options.

Waikato Regional Plan

71. The Waikato Regional Plan⁶⁷ also contains, policies and methods relevant to stormwater management, including that:

- (a) Discharges to water cause no significant adverse effects from flooding or erosion.⁶⁸
- (b) There are no significant adverse effects from downstream siltation.⁶⁹
- (c) At source management and treatment of stormwater discharges to reduce water quantity effects of discharges on receiving waters be encouraged.⁷⁰

⁶⁷ Waikato Regional Plan Water Module – Chapter 3.5.

⁶⁸ WRPS Policy 3.5.3.2(b).

⁶⁹ WRPS Policy 3.5.3.2(c).

⁷⁰ WRPS Policy 3.5.3.7.

(d) Promote avoid, remedying or mitigating the effects of existing stormwater discharges.⁷¹

(e) Maintaining control over measures to avoid, remedy or mitigate adverse effects on neighbouring property.⁷²

RELIEF SOUGHT

72. Ms Noakes generally supports the stormwater measures proposed by Council and considers that the new matters of discretion and assessment criteria proposed via Council's rebuttal evidence are a move in the right direction.

73. Ms Noakes also supports Council's proposed:

(a) Approach to Te Ture Whaimana outlined in Mr Martin's infrastructure evidence on behalf of Council that in today's perspective, giving effect to Te Ture Whaimana is close to the concept of "leave no footprints" or enabling the Awa to sustain life. Water discharging into the Awa needs to not only have its mana restored (Te Mana o te Wai) but also needs to be able to sustain life and not impact on the traditional and recreational values on the Awa downstream of the discharge.⁷³

(b) Amendments in the section 42A report to incorporate low impact design and the objectives and policies of Te Ture Whaimana into Variation 3.

(c) Amendments to the three waters servicing and impervious surfaces provisions which apply to both MDRZ2 as well as GRZ within the four towns.⁷⁴

Comprehensive approach

74. However, based Mr Davis' evidence, the provisions *throughout* Variation 3 that have a role in governing the effects of stormwater

⁷¹ WRPS Method 3.5.11.3.

⁷² WRPS Rule 3.5.11.6 (vii).

⁷³ Statement of evidence of Mr Martin at paragraph [25].

⁷⁴ Section 42A Report at [60].

need to be strengthened to explicitly address avoiding, remedying or mitigating:

- (a) adverse stormwater effects in terms of erosion / scour and alteration to run-off volume, frequency and duration; and
- (b) the adverse effects of urban stormwater on rural areas that do not have infrastructure designed to accommodate urban stormwater flows.

75. Council's stormwater expert Mr Boldero appears to agree with this approach in principle, recording agreement to the following points from Ms Noakes submission as follows:⁷⁵

- (a) *"If the Variation is approved then the stormwater management provisions throughout the PDP ought to be amended to ensure that such adverse stormwater effects on properties downstream of proposed development are appropriately, avoided remedied or mitigated. I agree with this statement which aligns with my recommendations I agree and recommend the District Plan is updated, and if this cannot be achieved through the Variation 3 process, that a separate plan change is pursued."*
- (b) *"The PDP should take a consistent approach to stormwater management across the entire plan and that the stormwater management provisions in all chapters should be amended accordingly. I agree with this statement which aligns with my recommendations."*

Flooding v stormwater effects

76. Council has proposed amendments to include references to water quality and quantity and low impact design. While this is a positive step, the amendments are not sufficient to ensure that the effects of concern to Ms Noakes are addressed at the consenting stage. As explained in Mr Davis' evidence, there is a distinction between flooding effects and stormwater effects such as erosion / scour or effects that can arise from alterations to hydrological parameters (i.e.

⁷⁵ Statement of Evidence of Mr Boldero at [53].

volume, frequency and duration)⁷⁶ and that to date relying on various stormwater guidelines has not been effective at managing these effects.⁷⁷

77. Referring only to “stormwater quantity” risks perpetuating the approach of focussing on flooding effects (i.e. if peak flow is attenuated there is no issue) and does not give sufficient comfort that the effects of concern to Ms Noakes will be addressed at the consenting stage.

Water sensitive and low impact design

78. There is a clear policy framework in the national and regional planning documents requiring water sensitive and low impact design, avoiding significant adverse effects on downstream or neighbouring properties (including from erosion and flooding). However, it is submitted, that the policy framework will not be implemented at the consenting stage, as required, unless there are clear requirements in the district plan.
79. Council has proposed including matters of discretion and assessment criteria relating to low impact design. However, for the reasons explained in Mr Davis’s evidence,⁷⁸ Ms Noakes says that Council’s proposed amendments do not go far enough because they do not clearly articulate what is meant by low impact design nor have these amendments been incorporated into all of the relevant provisions in PDP that were notified as part of Variation 3 that govern stormwater management.
80. In contrast, the amendments proposed in Mr Davis’ evidence, provide context and guidance as to what is required to implement water sensitive and low impact design (i.e. it requires consideration of the effects of stormwater including alterations to volume frequency and duration) and would better implement the regional planning framework.

⁷⁶ Rebuttal Statement of Mr Davis at [29]-[30].

⁷⁷ Statement of Evidence of Mr Davis at [16].

⁷⁸ Statement of Evidence of Mr Davis at [93]-[95].

Rural infrastructure

81. Mr Davis does not support infilling in the floodplain,⁷⁹ Ms Huls and Mr Boldero all agree that there should be no intensification / infill in the high-risk floodplain.⁸⁰ Mr Davis' also supports Mr Boldero's reservations about flood plain classification having underestimated the spatial extent of the high-risk area.⁸¹ All stormwater experts have agreed that infill should be discouraged in the flood plain should be discouraged or managed.⁸²
82. The implications for rural land is that there, is a risk that the cumulative effects of transfer of flow / flood levels downstream can exacerbate access, activity, and drainage and infrastructure erosion issues downstream.⁸³
83. A key issue identified in Mr Davis' evidence is that while urban stormwater can be managed through the provision of urban standard stormwater infrastructure in urbanising greenfields areas, urban stormwater will have different hydrological characteristics (i.e. volume, frequency and duration or runoff) that rural infrastructure typically has not been designed to manage. This can result in adverse effects on the receiving environment, such as those experienced by Ms Noakes.⁸⁴
84. Mr Davis has recommended including provisions via Variation 3 to discourage development and subdivision from locating in areas where the adverse effects of urban run-off discharging to areas with rural stormwater infrastructure cannot be adequately avoided, remedied or mitigated.⁸⁵

⁷⁹ Statement of Evidence of Mr Davis at [68].

⁸⁰ Statement of Evidence of Ms Huls at [39] and Statement of Evidence of Mr Boldero [17].

⁸¹ Statement of Evidence of Mr Davis at [69].

⁸² Stormwater JWS dated 11 July 202 at 3.2.b.iv.B.

⁸³ Statement of Evidence of Mr Davis at [70].

⁸⁴ Statement of Evidence of Mr Davis at [34]-[39].

⁸⁵ Rebuttal Statement of Mr Davis at [33] clarifies that the issue is not simply the alteration of stormwater runoff from urban development, which is acknowledged to occur with urban development. Rather, the concern is with respect to adverse effects produced by the urban development and associated alteration to stormwater runoff that requires to be avoided, remedied or mitigated.

85. Council has proposed including to effects on rural areas as a matter of discretion, however, it is submitted that is not particular enough to ensure that developments are not located in areas where the adverse effects of urban discharges rural areas (that do not have infrastructure designed to accommodate urban stormwater flows) cannot be adequately avoided, remedied or mitigated.
86. It is submitted that this approach proposed by Mr Davis would better allow natural and built environments to co-exist while still enabling the denser forms of development in appropriate areas or by recognising that downstream rural infrastructure may require upgrading to accommodate such altered stormwater flows.
87. Accordingly, Ms Noakes' position remains that the amendments as set out in Annexure 5 to Mr Davis' evidence in chief are required to address her concerns and it is submitted that incorporating the amendments as proposed in Annexure 5 of Mr Davis' evidence would better give effect to regional planning framework in relation to stormwater management.⁸⁶

Havelock Precinct

88. The Havelock Slope Residential area is adjacent to Ms Noakes' Property and is a steep landform that drains to Ms Noakes' Property. With the removal of the urban fringe qualifying matter, Council has proposed other qualifying matters and for Pookeno, applying to the Havelock site including:⁸⁷
- (a) retaining the PDP slope residential area minimum lot size of at least 2,500m²; and
- (b) a new standard of a single residential unit per site.
89. Ms Noakes supports these recommendations and considers that these will assist in managing the adverse effects of stormwater runoff and increased natural hazard risks from the slope residential area.

⁸⁶ An amended set of amendments to provisions sought will be circulated at the hearing, which will include refinements to better reflect Mr Davis' evidence and concerns about rural infrastructure as clarified in his rebuttal evidence.

⁸⁷ Section 42A Report – Appendix 5: Havelock Precinct – Draft Qualifying Matters and Controls dated 24 April 2023.

90. However, the bulk earthworks and retaining required for greenfield development (particularly in areas at risk of slope instability) can have adverse effects in terms of compacting soil and diverting and concentrating ground water and stormwater runoff.⁸⁸
91. Ms Noakes is seeking amendments to the earthworks provisions under Variation 3 of the to ensure that stormwater effects are also considered in relation to earthworks. Ms Noakes is also seeking amendments to ensure that urban development is not located in areas that would result in that urban stormwater discharge being discharged to rural areas that do not have the type and capacity of infrastructure designed to accommodate urban stormwater discharge where the adverse effects of such discharge cannot be adequately avoided, remedied or mitigated.
92. In conjunction with the lot size restrictions proposed for the Havelock Precincts, Ms Noakes considers that the amendments sought in relation to earthworks and rural infrastructure would be sufficient to address her concerns relating to the Havelock slope residential area.
93. However, in the absence of such amendments being made, Ms Noakes considers that the stormwater effects of earthworks in the Havelock Slope Residential Area would warrant more rigorous scrutiny.⁸⁹

Relief sought consistent with the NPS-UD intensification framework

94. The NPS-UD 2020 is clearly supportive of more intense urban environments, it does not establish a policy framework in which there are no limits to developments or where the need to provide sufficient residential development capacity trumps all other statutory or policy considerations.
95. The section 42A Report has proposed restrictions on the ability to develop in high risk flood areas. Ms Noakes' stormwater expert, Mr Davis, supports this approach but is concerned that it does not go far enough because the effect of allowing development in lower risk areas surrounding is to take up space that can otherwise be used to

⁸⁸ Statement of Evidence of Mr Davis at [36].

⁸⁹ Refer Statement of Evidence of Mr Davis at [84].

manage run-off and potentially shifts the problem downstream.⁹⁰ However, there is opposition to discouraging development in flood plans on the grounds that allowing development in these areas would provide greater residential housing development capacity.⁹¹

96. However, given that Variation 3 would enable such an excess of residential capacity,⁹² the limitations proposed by Council to address stormwater and flooding effects can be implemented while still meeting the requirement to give effect to the NPS-UD 2020.
97. The relevant objectives and policies of the NPS-UD relating to well-functioning urban environments and resilience to climate change would be better given effect to where district plan includes a robust stormwater management regime that specifically addresses the potential adverse effects of stormwater on downstream properties and makes it clear that infrastructure required to manage such effects may need to be provided to manage downstream effects (whether in an urban or rural environment).

Timing for resolving stormwater issues

98. The Section 42A Report has suggested that if stormwater management matters are unable to be addressed comprehensively through Variation 3 (due to Variation 3 being an IPI), then there are potentially alternative mechanisms, namely:⁹³
- (a) Ms Noakes' Appeal on stormwater management matters on the PDP; or
 - (b) a subsequent variation.
99. For the reasons set out above, it is submitted that Variation 3 does give the Panel considerable scope to address stormwater management matters and that the amendments sought by Ms Noakes

⁹⁰ Rebuttal Statement of Mr Davis at [20]-[22].

⁹¹ See for example the Statement of Evidence of Mr Tollemache at [1.14].

⁹² Statement of Evidence of Ms Fairgray at [10] on behalf of Council is that the enabled capacity under the Council-proposed scenarios ranges from 5 to 12 times the level of long-term demand and that the stormwater qualifying matter reduces the plan enabled capacity 11% (-7,600 dwellings), and the feasible capacity by 2% to 12%.

⁹³ Section 42A Report at [519] and Rebuttal Section 42A Report at [58].

(that would assist with this) are within scope of Variation 3 and the IPI process.⁹⁴

100. However, If the Panel was of the view that there are stormwater management effects that ought to be addressed but cannot be addressed in the context and process of Variation 3, it is submitted that there are real problems with approving Variation 3 and then relying on either of the above approaches:

(a) As set out above, the scope of the Appeal is relatively narrow and does not seek amendments to related chapters of the PDP such as earthworks that would be required to address stormwater management in a comprehensive and consistent way throughout the PDP.

(b) The Appeal is at the negotiation and discussion phase with Council and there are interested parties to involve so the outcome of the appeal (and the timing of resolution) remains uncertain. Relying on a relatively narrow appeal in a separate process the outcome of which is uncertain cannot provide the Panel with sufficient certainty that stormwater matters associated with more intense development enabled by Variation 3 will be adequately addressed.

(c) There are also real concerns regarding proposed reliance on a future subsequent process to resolve identified issues with this Variation:

(i) The effect of Council notifying Variation 3 with the urban fringe qualifying matter is that the GRZ continues to apply to the urban land at Pookeno adjacent to the Property. However, if Variation 3 is approved (in the absence of that qualifying matter or a suitable replacement) it will rezone the land MR22

⁹⁴ In terms of informing urban planning decisions by up to date evidence NPS-UD, Objective 7 would be better given effect to if all of the stormwater issues identified in the Te Miro Report are addressed (preferably through or concurrently with the Variation 3 process).

(incorporating the MDRS) and enable greater intensification.

- (ii) As set out above in the discussion on the legal framework the general plan-making requirements in the RMA have not been set aside by the amendments to the RMA under the Amendment Act. It is submitted that Variation 3 is required to stand on its own two feet in terms of meeting those requirements and that it will not do so unless the stormwater management issues identified are addressed either through amendments to Variation 3 or concurrently with Variation 3.
- (iii) If that cannot occur then it is submitted that appropriate course of action is for the Panel to recommend that Variation 3 not be approved (or place it on hold) rather than proceed in the hope that some future process will address the adverse effects.
- (iv) Council's rebuttal s42A Report noted that a new plan change or variation would need to occur at a later date and that therefore a precautionary approach is warranted. In that regard it is submitted that placing Variation 3 on hold to allow a future variation to catch up with it would maintain that status quo in the interim and avoid enabling development for which the potential adverse stormwater effects of that development are not able to be addressed properly at the consenting stage.⁹⁵

⁹⁵ This would be consistent with the approach taken in the Auckland region where that Council's IPI, Plan Change 78 (Intensification) has had its hearings deferred after the Council sought, and the Minister granted, a 12-month extension to enable Auckland Council to undertake a thorough investigation of stormwater and flooding issues in the region following the January and February severe weather events and flooding. The information out of that process is that the variation required to address these issues is likely to result in substantive change to Plan Change 78.

CONCLUSION

101. Under the Amendment Act the presumption is that all areas are suitable for intensification unless there is good reason not to (i.e. a qualifying matter). This default approach gives little consideration to the effects of extending the MDRS to the rural urban boundary might impact on rural areas and the provisions that will be required to address those effects.
102. Council is required to incorporate the MDRS into the PDP but also needs to address the adverse effects generated by this more intense form of development in order to comply with applicable statutory and planning policy.
103. In relation to stormwater, the existing regime has not been working well in all places. The predominant focus on flooding, rather than the effects of stormwater, has meant that in practice water sensitive and low impact design is not always achieved at the consenting stage because this requires an awareness and consideration of how urban development can alter hydrologic parameters and the potential adverse effects of this.
104. Council cannot solely rely on a plethora of bylaws, management plans and guidance documents to achieve best practice stormwater management in its district. The potential for intensification to increase adverse stormwater effects makes it even more critical that the stormwater management regime is robust, well-functioning and consistently addressed through clear and explicit requirements in all of the provisions that play a role in governing stormwater throughout Variation 3.



JL Beresford

Counsel for Anna Noakes and
MSBCA Fruhling Trustee's Company Limited

ANNEXURE ONE: RELIEF SOUGHT IN PDP APPEAL

ATTACHMENT FOUR

ENV-2022-AKL-000078 Noakes v Waikato District Council – Amended Appeal Relief Sought

| No. | Provision | Relief Sought |
|--|---|--|
| Part 1 Chapter 5 – Interpretation Definitions | | |
| 1. | Impervious surface | <p>Means a surface that is not vegetated, and which prevents or significantly retards-reduces or prevents the soakage of water into the ground. It includes:</p> <ul style="list-style-type: none"> (a) Roofs (b) Paved areas including driveways and sealed/compacted metal parking areas, (c) Patios (d) Sealed and compacted metal roads, and (e) Layers engineered to be impervious such as highly-compacted soil. <p>It excludes:</p> <ul style="list-style-type: none"> (f) Wooden decks with spacing between boards of 4mm or more, where water is allowed to drain through to a permeable surface below the deck; (g) Grass and bush areas; (h) Gardens and other vegetated areas; (i) Porous or permeable paving; (j) Green or living roofs; (k) Permeable artificial surfaces, fields or lawns; (l) Slatted decks; (m) Swimming pools, ponds and dammed water; and (n) Rain tanks; and (o) Farm tracks. |
| Part 2 Chapter 3 – All infrastructure | | |
| 2. | AINF-P25 Provide adequate infrastructure | <p>Ensure adequate provision of infrastructure, including land transport networks, where land is subdivided creating one or more additional lots, excluding reserve or non-housing conservation lots, access and utility allotments, or its use is significantly changed or intensified, needing additional or upgraded infrastructure. <u>In relation to stormwater infrastructure adequate infrastructure means avoiding, remedying or mitigating adverse effects on the environment, community health, safety, and amenity and does not compromise the economic viability of downstream land.</u></p> |

| | | |
|----|---|---|
| 3. | AINF-P26 Infrastructure location and services | <p>(1) Ensure subdivision, use and development are provided with infrastructure and services to a level that is appropriate to its location and intended use including:</p> <p>(a) Three waters (water, wastewater and stormwater management); In relation to stormwater infrastructure adequate infrastructure means avoiding, remedying or mitigating adverse effects on the environment, community health, safety, and amenity and does not compromise the economic viability of downstream land;</p> <p>(b) Telecommunication services;</p> <p>(c) Electricity services; and</p> <p>(d) Adequate water supply within urban areas for firefighting purposes</p> |
| 4. | AINF-P28 Stormwater, drainage and flood management | <p>(1) Ensure that stormwater and drainage infrastructure for subdivision, land use and development:</p> <p>(a) Adopts, where appropriate, a best-practice low impact design approach to the management of stormwater;</p> <p>(b) Manages stormwater in accordance with a drainage hierarchy, with a preference for at-source management;</p> <p>(c) Minimises impervious surfaces to reduce stormwater run-off;</p> <p>(d) Retains pre-development hydrological conditions including run-off frequency,- volume, and duration as far as practicable for the development and downstream catchment;</p> <p>(e) Does not increase the frequency, volume and duration of flow of stormwater runoff onto adjoining properties adjacent land and/or flood plains, and/or reduce storage capacity on-site;</p> <p>(f) Provides a stormwater catchment management plan for future urban development and maximum probable development scenario; and</p> <p>(g) Promotes clean water reuse and groundwater recharge where practicable;</p> <p>(h) Avoids, remedies or mitigates the generation of contaminants from urban development; and</p> <p>(i) Is supported by a stormwater management plan that includes the entire catchment and not limited to the spatial extent of the development.</p> <p>...</p> |
| 5. | AINF-R16 Service connections for subdivision | <p>(1) Activity status: PER</p> <p>Activity-specific standards:</p> <p>(a) All new lots created as part of a subdivision other than a utility allotment, access allotment or reserve allotment, must be designed and located so that provision is made for access and service connections up to the boundary of the lot for:</p> <p>(i) Wastewater;</p> <p>(ii) Water supply;</p> <p>(iii) Stormwater (a management system that complies with Rule WWS-R1);</p> <p>...</p> <p>(2) Activity status where compliance not achieved: RDIS</p> |

| | | |
|--|---|---|
| | | <p>Council's discretion is restricted to the following matters:</p> <ul style="list-style-type: none"> (a) The adequacy of the service connection; (b) The functional and operational needs of, and benefits derived from, the infrastructure; (c) Subdivision layout; (e) Offsite stormwater drainage pattern effects (including the potential to increase the run-off frequency, volume and duration on adjacent land); and <p>...</p> |
| <p>Part 2 Chapter 12 – WWS – Water, Wastewater and stormwater</p> | | |
| <p>6.</p> | <p>WWS-RI Stormwater systems for new development or subdivision</p> | <p>(I) Activity status: PER</p> <p>Activity-specific standards:</p> <ul style="list-style-type: none"> (a) New development or subdivision must have a stormwater system that complies with all of the following standards: <ul style="list-style-type: none"> (i) Operates by gravity; (ii) Manages stormwater through a Stormwater Management Plan in the following manner: (1) Primary systems detain or retain runoff from all impervious surfaces during a 10% Annual Exceedance Probability storm event to ensure that the rate of any stormwater discharge and the run-off frequency, volume and duration off-site is at or below pre-development rates; and (2) Secondary overflows are conveyed to a system or drainage path designed to collect concentrated stormwater during events up to and including a 1% Annual Exceedance Probability; or (3) A controlled discharge to a reticulated network or receiving environment waterbody that will have equivalent capacity (as in (i) and (ii) above) once the catchment is fully developed. (iii) Stormwater management measures must be in place and operational upon the completion of subdivision and/or development; (iv) Systems must be designed using rainfall data specific to the area in which the property is located and be adjusted for a climate change temperature increase of 2.1°C; [Note: amend for consistency] (v) Stormwater management measures, including low impact design measures, must be implemented as appropriate in accordance with the following drainage hierarchy: <ul style="list-style-type: none"> (1) Retention of rainwater/stormwater for reuse; (2) Soakage techniques; (3) Infiltration rate of a minimum of 7mm/hour; (4) Treatment, detention and gradual release to a perennial watercourse in a manner that does not increase the volume, frequency or duration of flow on adjacent land; (5) Treatment, detention and gradual release to a piped stormwater system. |

| | | |
|----|--|--|
| | | <p>(6) Stormwater treatment shall address-ensure that water quality; downstream erosion and scour effects; and cumulative volume, frequency and duration of flow effects are managed to pre-development levels.</p> <p>(vi) Where land is subject to instability, stormwater discharges directly to ground occurs only where the ground conditions have been identified as being suitable to absorb such discharges without causing, accelerating or contributing to land instability and downstream effects either on the site or on neighbouring properties;</p> <p>(vii) Connection of new development to any existing stormwater drainage system must not result in the minimum level of service not being met or the minimum level of capacity being exceeded or the volume, frequency or duration of flow on downstream exceeding pre-development levels. Alteration of the existing receiving stormwater network drainage system to achieve minimum level of service or additional onsite detention volume to ensure existing capacity will be required.</p> <p>Advice notes: Acceptable means of compliance for the provision, design and construction of stormwater infrastructure, including low impact design features, are contained within the Regional Infrastructure Technical Specifications (RITS). Refer also to Waikato Stormwater Management Guideline and Waikato Stormwater Run-off Modelling Guideline. A stormwater discharge consent may also be required from the Waikato Regional Council.</p> <p>(2) Activity status where compliance not achieved: RDIS</p> <p>Council's discretion is restricted to the following matters:</p> <p>(a) The likely effectiveness of the system to avoid flooding, increased frequency, and volume and duration of stormwater discharge, nuisance or damage (including scouring and erosion) to other buildings and sites;</p> <p>(b) The capacity of the system and suitability to manage stormwater and ensure that pre-development hydrological conditions (including adverse alteration of run-off frequency, and volume and duration of stormwater discharge) are maintained;</p> <p>(c) The potential for adverse effects to the environment in terms of stormwater run-off frequency and quantity (volume and duration) and stormwater quality effects; and</p> <p>(d) Extent to which low impact design principles and approaches are used.</p> |
| 7. | WWS-R7 Stormwater ponds or wetlands | <p>(1) Activity status: PER</p> <p>Activity-specific standards:</p> <p>(a) Stormwater ponds or wetlands that comply with the following:</p> <p>(i) The area of the pond or wetland does not exceed the equivalent site building coverage standards applicable to the zone.</p> |

| | | |
|--|---|--|
| | | <p>(2) Activity status where compliance not achieved: RDIS Council's discretion is restricted to the following matters:</p> <p>(a) The functional need and operational need of, and benefits derived from, the infrastructure; (b) Visual, streetscape and amenity effects; (c) Road network safety and efficiency; (d) The risk of hazards to public or individual safety, and risk of property damage; and (e) Effects on the specific values, qualities and characteristics of any Identified Area. (f) The maintenance of pre-development hydrological conditions including the frequency, volume and duration of downstream flows.</p> |
| 8. | <p>WWS-R14 Stormwater ponds or wetlands that serve more than one site or alterations to stormwater ponds and wetland, that serve more than one site, located within: GRZ – General residential zone; Medium density residential zone; ...</p> | <p>(1) Activity status: RDIS Activity-specific standards: Nil. Council's discretion is restricted to the following matters:</p> <p>(a) The functional need and operational need of, and benefits derived from, the infrastructure; (b) Visual, streetscape and amenity effects; (c) Road network safety and efficiency; (d) The risk of hazards to public or individual safety, and risk of property damage; and (e) The effects on downstream properties resulting from any changes from the pre-development hydrological conditions, (including adverse alteration of run-off frequency, and volume and duration. (e) Effects on the specific values, qualities and characteristics of any Identified Area.</p> |
| Part 2 Chapter 15 – Natural Hazards | | |
| 9. | <p>NH-PI5 Managing flood hazards through integrated</p> | <p>Manage flood hazards by requiring new subdivision and development within floodplains, flood ponding areas and overland flow paths to adopt integrated catchment plan-based management methods which:</p> <p>(a) Maintain the function of natural floodplains, wetlands and ponding areas including flood storage capacity; and</p> |

| | | |
|--|-----------------------------------|--|
| | catchment management. | <p>(b) Retain the function and capacity of overland flow paths to convey stormwater run-off; and</p> <p>(c) Do not transfer or increase risk elsewhere within the catchment, or result in increased including run-off volume and frequency and duration elsewhere in the catchment; and</p> <p>(d) Promote best practice stormwater management with reference to the Waikato Stormwater Management Guideline and the Regional Infrastructure Technical Specifications (RITS); and</p> <p>(e) Minimise impervious surfaces.</p> |
| Part 2 Chapter 25 – Subdivision | | |
| 10. | SUB-P2 Residential subdivision | <p>(1) Promote-Enable residential subdivision and development that: Designs infrastructure to manage stormwater in a sustainable manner by:</p> <p>(1) Minimising environmental impacts and maintenance costs, and reducing stormwater discharging to existing reticulated network and downstream sites; and</p> <p>(2) Promoting and maintaining riparian margins.</p> |
| 11. | SUB-P4 Servicing requirements | <p>Require subdivision and development in all zones except for GRUZ – General rural zone and RLZ – Rural lifestyle zone to be serviced to a level that will provide for the anticipated activities in a structure plan, or otherwise anticipated within the zone, including through the provision of:</p> <p>...</p> <p>(g) Stormwater collection, treatment, attenuation and disposal that maintains predevelopment hydrological conditions, including run-off volume, -and frequency and duration;</p> |
| 12. | SUB-R11 Subdivision General | <p>(I) Activity status: RDIS</p> <p>Activity specific standards:</p> <p>(a) Subdivision shall comply with all of the following:</p> <p>(i) Proposed lots must have a minimum net site area (excluding access legs) of 450m², except where the proposed lot is an access allotment or utility allotment or reserve to vest;</p> <p>(ii) Proposed lots must be able to connect to public-reticulated water supply and wastewater;</p> <p>(iii) Where the subdivision is within a structure plan area, neighbourhood centres within the site are provided in accordance with that structure plan document.</p> |

| | | |
|-----|--|--|
| | | <p>Council’s discretion is restricted to the following matters:</p> <ul style="list-style-type: none"> (b) Subdivision layout including the grid layout of roads and the number of rear lots; (c) Shape of lots and variation in lot sizes; (d) Ability of lots to accommodate a practical building platform including geotechnical stability for building; (e) Likely location of future buildings and their potential effects on the environment; (f) Avoidance or mitigation of natural hazards <u>(x) avoidance of adverse stormwater effects on downstream properties, including adverse alteration of run-off frequency, and volume and duration;</u> (g) Amenity values; and (h) Potential for reverse sensitivity effects; (i) Streetscape landscaping; (j) Vehicle and pedestrian networks; (k) Consistency with any relevant structure plan or master plan included in the plan, including the provision of neighbourhood parks, reserves and neighbourhood centres; and (l) Avoidance or mitigation of conflict with gas transmission infrastructure and the ability to inspect, maintain and upgrade the infrastructure; and (m) Provision for new infrastructure and the operation, maintenance, upgrading and development of existing infrastructure including water supply for firefighting purposes. |
| 13. | SUB-R31 Subdivision – general Medium Density Residential Zone | <p>(I) Activity status: RDIS</p> <p>Activity specific standards:</p> <ul style="list-style-type: none"> (a) Subdivision must comply with all of the following standards: (i) Proposed vacant lots must have a minimum net site area (excluding access legs) of 200m², except where the proposed lot is an access allotment, utility allotment or reserve to vest; and (ii) Proposed vacant lots must be able to connect to public-reticulated water supply and wastewater. <p>Council’s discretion is restricted to the following matters:</p> <ul style="list-style-type: none"> (a) Subdivision layout; (b) Shape of lots and variation in lot sizes; (c) Ability of lots to accommodate a practical building platform including geotechnical stability for building; (d) Likely location of future buildings and their potential effects on the environment; (e) Avoidance or mitigation of natural hazards |

| | | |
|--|--|---|
| | | <p>(x) avoidance of adverse stormwater effects on downstream properties, including adverse alteration of run-off frequency, volume and duration.;</p> <p>(f) Opportunities for streetscape landscaping;</p> <p>(g) Vehicle and pedestrian networks;</p> <p>(h) Consistency with any relevant structure plan or master plan including the provision of neighbourhood parks, reserves and neighbourhood centres; and</p> <p>(i) Provision of infrastructure.</p> <p>(2) Activity status where compliance not achieved: DIS</p> |
| Part 3 Chapter 2 – General Residential Zone | | |
| 14. | <p>GRZ-S13</p> <p>(1) Activity status: PER</p> <p>Where: The impervious surfaces of a site shall not exceed 70%.</p> | <p>(2) Activity status where compliance not achieved: RDIS</p> <p>Council’s discretion is restricted to the following matters:</p> <p>Site design, layout and amenity; and The risk of flooding, nuisance or damage to the site or other buildings and sites.</p> <p>Adverse stormwater effects on downstream properties, including adverse alteration of run-off frequency volume, and duration.</p> |